

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 5, 2015 appellant, then a 59-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right thumb that day when unloading a truck while in the performance of duty. OWCP accepted appellant's claim for right thumb trigger finger and neck sprain. It also authorized a March 16, 2015 right thumb trigger finger release.³ On December 17, 2017 Dr. Jeffery L. Cummings, Board-certified in orthopedic surgery advised that appellant had reached maximum medical improvement as of December 11, 2015. He indicated that he did not perform permanent impairment examinations.

On January 11, 2016 appellant filed a claim for a schedule award (Form CA-7).

In order to obtain an impairment rating for schedule award purposes, OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician. In a March 8, 2017 report, utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ he found that appellant had zero percent upper extremity permanent impairment due to her accepted cervical sprain. With regard to appellant's accepted right thumb condition, Dr. Swartz found two percent right upper extremity permanent impairment based on a diagnosis of trigger digit (thumb) under the diagnosis-based impairment (DBI) method of rating permanent impairment.⁵

In a May 4, 2017 report, OWCP's district medical adviser (DMA) reviewed the relevant medical evidence, including Dr. Swartz's March 8, 2017 second opinion evaluation, and concurred with the rating of two percent right upper extremity permanent impairment.

By decision dated May 9, 2017, OWCP found that, relying upon the second opinion physician, Dr. Swartz and the DMA's calculations, appellant had two percent permanent impairment of the right upper extremity.

On July 5, 2017 appellant requested reconsideration of OWCP's May 9, 2017 decision contending that she was entitled to additional schedule award compensation due to the number of years that she worked for the Federal Government. She argued that OWCP discriminated against her. Appellant argued that her right thumb was not functioning and she was only using her left hand and half of her right hand. She further argued that Dr. Swartz had not examined her thumb, but rather he just asked her questions. Appellant explained that she had no use of her right hand

³ Dr. Jeffery R. Cummings, an orthopedic surgeon, performed the surgery.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ *Id.* at Table 15-2, Digit Regional Grid, A.M.A., *Guides* 392.

because of her faulty thumb and index finger. She also made several arguments about all the activities of daily living that she could no longer enjoy because of her injury.

By decision dated September 19, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Preliminarily the Board finds that OWCP did not receive additional evidence of permanent impairment with appellant's October 23, 2017 reconsideration request.¹¹ The Board will therefore

⁶ This section provides in pertinent part: the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

¹¹ See *S.C.*, Docket No. 18-0992 (issued February 21, 2019); *K.K.*, Docket No. 15-1684 (issued October 23, 2015) (When a claimant does not submit relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision.)

consider this a proper reconsideration request as opposed to a claim for an increased schedule award.

OWCP issued a decision dated May 9, 2017, finding that appellant was entitled to a schedule award for two percent permanent impairment of her right upper extremity, based on the accepted injury of a right trigger finger and neck sprain. On June 14, 2017 appellant requested reconsideration of OWCP's May 9, 2017 decision.

On reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. She argued in the June 14, 2017 request for reconsideration that OWCP had discriminated against her, that her right thumb was not functioning and she was only using her left hand and half of her right hand, that Dr. Swartz did not examine her thumb but just asked her questions, and that she could no longer perform activities of daily because of her injury. However, appellant did not present evidence to show discrimination. Furthermore, the issue of the use of her thumb is medical in nature and she would need to support these arguments with new medical evidence. The Board finds that these arguments do not show error by OWCP. As such, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

On reconsideration, appellant did not submit additional medical evidence demonstrating a greater impairment due to her accepted injuries. As she has not submitted relevant and pertinent new evidence on appeal, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board